IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 502 of 1995
WITH
SPECIAL CIVIL APPLICATION NO. 10253 OF 1995

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1-2 yes
3-5 no

VETERNARY OFFICER & 1
Versus
RAJENDRASINH R JHALA

Appearance:
SPECIAL C.A. NO. 502 OF 1995:

MR HS MUNSHAW for Petitioner
MR.RC PATHAK for respondent.

SPECIAL C.A. NO. 10253 OF 1995:

MR. R.C. PATHAK for the petitioner
MR. H.S. MUNSHAW for the respondent

CORAM : MR.JUSTICE R.BALIA.
Date of decision: 21/03/97

ORAL JUDGEMENT

The petitioner has challenged the award of the

labour court, Rajkot in Reference No. 661 of 1991. The dispute has arisen in the following circumstances. Rajendrasinh Ranjitsinh Jhala was appointed as patawala on daily wages in the office of veterinary dispensary at Wankaner on 29.7.1986 apparently stating to be appointment for four hours duty daily. Such appointment continued till 19.6.1990. On that date the employee's services were terminated without resorting to the provisions for procedure of retrenchment under Section 25F of the Industrial Disputes Act. From the sample order issued from time to time extending the period of appointment it is apparent that the appointment from beginning was against vacant post of patawala which still continues to exist and the post carries on regular emoluments. Reasons for termination was stated to be that as on 15.6.1990 a person has been regularly appointed, the services of the workman were not required. These facts are not in dispute. The tribunal found that the employee was discharging his duties for 6 hours, beyond the hours mentioned in the order, retrenchment to be invalid being in violation of Section 25F of the I.D. Act and directed the workman to be reinstated in the cadre of patawala of regular pay scale. The workman has been denied backwages by holding that since he has admitted in his statement that he has not made any attempt to seek alternative job, it must be deemed that during the period when termination order remained effective, the workman was working somewhere. On these premise the backwages for the intervening period were denied.

2. Special Civil Application No. 502 of 1995 has been preferred by the employer, Rajkot District Panchayat challenging the order of reinstatement on the regular cadre with regular pay scale of the patawala and the Special Civil Application No. 10253 of 1995 has been filed by the workman challenging the denial of backwages.

3. Further facts that may be taken note of that in pursuance of the order of the award the workman was reinstated and thereafter by fresh order dated 27.11.1995 services of the employee have been again terminated in violation of Section 25G of I.D. Act.
The subsequent termination has also been challenged by amending writ petition Special Civil Application No. 10253 of 1995.

4. So far as Special Civil Application No. 502 is concerned Mr. Munshaw appearing for the District Panchayat states that in pursuance of the award, the respondent has been reinstated and thereafter he has

again been retrenched by following due procedure of law. In view thereof he further stated that in implementing the award if the workman has not been paid regular pay scale the same shall be paid so as to see that the award under challenge is fully implemented from the date of reinstatement to the date of termination without prejudice to his contention in support of subsequent terminations. In the facts and circumstances of the present case, I am otherwise of the opinion that the award is justified and does not call for interference. The respondent employee had been appointed against an existing vacancy to a post for which he was fully qualified and he has discharged the regular duties of the post, notwithstanding limited period of duty expressed in appointment order for almost a period of four years. His services during that period were not unsatisfactory. Thereafter, he has been unceremoniously discharged from service without fulfilling conditions of valid retrenchment which undisputedly apply. In that view of the matter, termination of service has rightly been held to be invalid. In fact the only objection to award has been in respect of direction to regularisation of services and to be paid in regular pay scale. Keeping in view the principle enunciated in STATE OF HARYANA AND OTHERS VS. PIARA SINGH AND OTHERS reported in (1992) 4 SCC 188 wherein the Supreme Court laid down that, if for any reason, an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and qualified according to the rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State, the order of the Tribunal was fully justified. It has further to be noticed that present is a case where there is only procedural irregularity in appointment of petitioner to an existing post for which he was fully eligible when appointed. After his appointment, no regular selections were held for regular appointment at which the workman could take his chance for regular selection. Nor such chance was offered to him while new person has been alleged to be appointed after regular selection. On equity, fairplay and justice the relief given to the petitioner was fully justified. The Special Civil Application No. 502 of 1995 is, therefore, dismissed. Rule is discharged.

5. Coming to the petition of petitioner workman so far as the claim to the backwages from the date of termination i.e. 15.6.1990 to the date of reinstatement, it is to be seen that no evidence has been led by the employer that the workman was gainfully employed

anywhere. The workman in his statement has denied that during the period he was gainfully employed anywhere. Thus it is a case in which there is no evidence on record about the gainful employment of the workman during the intervening period. The fact that the workman in his statement has stated that he has not made any effort to see an alternative employment does not lead to any inference that because he was gainfully employed elsewhere, he must not have sought alternative employment. On the contrary it is well established that even if an employee who has been illegally retrenched has to do certain work and earn his livelihood to save himself from starvation does not disentitle him to the claim of backwages which is a normal consequence of reinstatement as a result of illegal retrenchment which cannot be denied. Therefore, denial of backwages to the workman when retrenchment was held to be invalid was not justified in the instant case on the basis of the material on record. Law is well settled that grant of backwages is a rule, denial is exception. For invoking exception, conditions for such exception must be shown to exist, by person who relies on exception, which in the case of denying backwages ordinarily means some material to suggest that the worker was gainfully employed during that period which was something more than mere necessity to preserve oneself. There being no such evidence, award to the extent it backwages suffers from apparent error on the face of record. To that extent, the award calls for interference.

6. Learned counsel for the respondent urged that so far as the question of termination by order dated 27.11.1995 is concerned, the termination has been effected after following due procedure and grievance, if any, the workman should be left to raise before the labour court by approaching appropriate authority.

7. In the ordinary circumstances the plea of Mr. Munshaw would have been accepted. However, in the circumstances of the present case, it would be harsh on the workman to relegate him once again to the process of undertaking adjudication through industrial dispute if the same can be resolved on undisputed facts. The undisputable and untenable facts to which I had adverted to earlier go to disclose that the workman was required to discharge the duties of patawala against the existing regular post since 1986. The fact that his appointment order issued from time to time requiring to discharge the duties during the office hours of the dispensary only does not retract from the fact that even a regular recruited patawala is required to discharge the same

duties. It is not the case of employer that he was not required to discharge regular duties of patawala fully. It is only because of the employer himself that instead of giving him employment through regular process of selection and appointment of regularly selected person against the existing post, it resorted to a methodology by securing discharge of the duties of a vacant post continuously for a period of almost four years by a person on payment of much lower emoluments which otherwise it would have been liable to pay had the person appointed ad hoc or regularly and also that methodology has resulted in denying an incumbent of the post to his regular emoluments and Status by the instrumentality of the State itself having not resorted to adopt the method of regular employment to avoid its financial burden which it has undertaken in respect of regular work of the post being discharged by the persons working against the post just by naming the appointment as `on daily wages'. When the work existed and the incumbent was employed to discharge regular work of the existing post for a continuous period of four years regularly only to give it a colour of periodical employment on daily wages amounts to unfair trade practice within the meaning of Section 2(ra) read with item 10 in Schedule V of I.D. Act. This unreasonable situation created by State's own action brooks remedial relief. The termination of each previous employment with fresh appointment or extension of previous employment to give it a color of stop-gap arrangement in the circumstances is nothing but a denial of just and fair treatment which is the right of the persons discharging duties against regularly existing post through denial of regular emoluments for the benefit of employer. The petitioner workman on admitted premise was discharging the duties of regular post for which a regular incumbent or any person appointed against the post would have discharged and would have been entitled to emoluments of post. For applicability of principle of equal pay for equal work, in such case one does not have to investigate into the similarity of duties of the post. In CHIEF CONSERVATOR OF FORESTS & ANR. VS. JAGANNATH MARUTI KONDHARE (1996) 1 LLJ 1223 the apex court affirming the conclusion of Industrial Tribunal that employees had been in employment of State for five to six years as casuals while work of permanent character existed, such practice of employer is unfair labour practice within the meaning of I.D. Act and ordered regularisation of such workmen said:

"Permanency is thus writ large on the face of both the types of work. If, even in such projects, persons are kept in jobs on casual

basis for years the object manifests itself; no scrutiny is required."

These observations were made in the context of finding as to object of employer to deprive the workmen of the status and privileges of permanent employees. Regularisation granted by the Tribunal was upheld.

In STATE OF HARYANA AND OTHERS VS. PIARA SINGH AND OTHERS reported in (1992) 4 SCC 188 the Supreme Court after noticing that in exigencies if for any reason, an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation, said:

"So far as the work-charged employees and casual labour are concerned, the effort must be to regularise them as far as possible and as early as possible subject to their fulfilling the qualifications, if any, prescribed for the post and subject also to availability of work. If a casual labourer is continued for a fairly long spell - say two or three years - a presumption may arise that there is regular need for his services. In such a situation, it becomes obligatory for the authority concerned to examine the feasibility of his regularisation. While doing so, the authorities ought to adopt a positive approach coupled with an empathy for the person. As has been repeatedly stressed by this Court, security of tenure is necessary for an employee to give his best to the job. In this behalf, we do commend the orders of the Government of Haryana (contained in its letter dated April 6, 1990 referred to hereinbefore) both in relation to work-charged employees as well as casual labour".

8. It would further be noticed that short of the technicalities, provisions of Industrial Disputes Act which governs the employer-employee relationship in the present case provides an inbuilt protection against such arbitrary acts. While Section 25F provides protection against illegal retrenchment and Section 25G incorporates the elementary rule of inhibition against discrimination by envisaging that last come will be first to go out in case retrenchment is required to be made unless special grounds existed to avoid the rule, Section 25H requires the employer after retrenchment has taken place validly if the same post is to be filled in by employing new

person the outgoing person or those from amongst outgoing persons must be given first preference by offering an opportunity to accept reemployment on the post in order of seniority. The petitioner was working against the post of patawala since 1986. Even for his retrenchment on 19.6.1990 to be void, person employed against the post later than the petitioner were to go first in terms of Section 25G. Instrument of a valid termination cannot be used merely for the purpose of recruiting new hands by getting rid of old hands who have not only protection against illegal retrenchment but protection against new recruitments against the post by securing preferential right to be appointed against new hands. It must be noticed that the parliament has been zealous to guard against such eventuality by providing preferential right to new appointments in future by the employer notwithstanding employer adopting different methodology by providing terms of employment by way of contract rules or other statutory measures. The legislative Will is indicated in Section 25J of the Act which makes provisions under Chapter V-A and V-B of the Industrial Disputes Act to be effective notwithstanding anything inconsistent therewith contained in any other law including standing orders made under Industrial employment (Standing Orders) Act, 1946. Exception to Section 25-J has been provided only where the provisions of any other Act or rules or orders, notifications issued thereunder or under any standing orders or under any award, contract of service or otherwise, a workman is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act. The workman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he receives benefits in respect of other matters under this Act. The fact that only such provisions contained in any other Act, rules, orders or notifications which are more beneficial can override provisions of Chapter V-A which includes Section 25H leads to an irresistable conclusion that any provisions contained in any other act, rules, orders or notifications issued under such Acts or rules or standing orders or award, contract or services otherwise which are less beneficial or takes away rights conferred under Chapter V-A and Chapter V-B cannot be given effect to and the rights accorded under Chapter V-A takes precedence. Therefore, the mere fact that a person discharging the duties of a post which existed throughout his tenure was not in the first instance regularly selected and is sought to be replaced by regularly selected persons under rules cannot take away his right to secure regular appointment in preference to new incumbents. It would

also be travesty of justice and circumvention of law if the effect of this law could be obviated simply by first appointing a regularly selected person then to terminate the services of person working against such post for long period services and take the plea of no vacancy. It would open flood-gates to evade the provisions of law by resorting to sharp practice on technical pleas by any unscrupulous employer. In such circumstances it will be reasonable to adopt the view that if retrenchment takes place, now or later, incumbent must go first in accordance with Section 25-G. Therefore, in my opinion, so long as the post was continuing on which recruitment was necessitated and the workman employed against is worked so satisfactory without giving an opportunity of preferential appointment he could not be denied the benefit of continuing on the post by resorting to retrenchment once again, after, admittedly, he has been reinstated on regular basis as stated by the learned counsel for the District Panchayat in compliance with award under challenge.

9. I therefore allow this petition modifying the award to the extent it denies the workman backwages and direct that the reinstatement of the work shall be with full backwages with effect from the termination to the date of reinstatement. However, the amount of backwages shall be restricted to the emoluments which he was receiving at the time of his first retrenchment and he shall be placed in regular employment only with effect from the date of his reinstatement and quash termination of his services vide order dated 25.11.1996 as the same would be clearly in contravention of Sections 25G and 25H of the Industrial Disputes Act read with Section 25-J. Rule is made absolute accordingly with costs.

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